Supreme Court, U.S.
FILED
AUG 0 1 1996
OFFICE OF THE CLERK

(3)

No. 95-2077

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

OSCAR GONZALEZ, Sheriff, Val Verde County, Texas,
and
BILL MCGEE, Sheriff, Forrest County, Mississippi,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

STEPHEN P. HALBROOK*
Richard E. Gardiner
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorneys for Petitioners

*Counsel of Record

10pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for the Petitioners 1

TABLE OF AUTHORITIES

CASES Page

New York v. *United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992) 6

Mack v. United States, cert. granted, No. 95-1503 (June 17, 1996) 7

Printz v. United States, cert. granted, No. 95-1478 (June 17, 1996) 7

Romero v. *United States*, 883 F. Supp. 1076 (W.D.La. 1995) 3

STATUTES & CONSTITUTIONS

18 U.S.C. §922(s)(1)(A)(ii)(I) 2

18 U.S.C. §922(s)(7) 2

18 U.S.C. §925A 2

Miss. Code §45-9-51 3

Miss. Const., Art. III, §12 3

Tex. Local Gov't. Code §215.001(a) 5

Tex. Const., Art. 1, § 23 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-2077

J.R. KOOG, Sheriff, Val Verde County, Texas, and
BILL MCGEE, Sheriff, Forrest County, Mississippi,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Sheriffs J.R. Koog (now succeeded in office by Sheriff Oscar Gonzalez) and Bill McGee, the cross-petitioners, argue that the dealer-to-CLEO notice requirement, the waiting period, and the CLEO veto power are not severable from the unconstitutional commands to CLEOs. The United States suggests that the sheriffs may not have standing to challenge the waiting period "because it does not affect them." (Br. 3.) To the contrary, the sheriffs will be held politically accountable by their constituents who purchase handguns and they may be exposed to lawsuits as a result of the waiting period, the notification requirement, and the veto provision.

Constituents will have to wait the full five business

days to purchase handguns, unless the sheriffs conduct the background checks and notify the dealers that the sale may be consummated. §922(s)(1)(A)(ii)(I) imposes the 5-day wait, but subparagraph (II) waives the wait if the CLEO notifies the dealer that the transfer would not violate the law. Sheriffs who do not accommodate their constituents will suffer at the polls.

The sheriffs will also be held politically accountable and will open themselves to lawsuits by law-abiding handgun purchasers who value their privacy and want the records about their lawful purchases destroyed. As enactment of the destruction requirement itself reflects, handgun purchasers, through the exercise of their political influence, oppose perceived attempts to create any local, State, or federal system of registration of handgun purchasers. Any sheriff who does not destroy the records involuntarily received from dealers will suffer at the polls. Nor is the sheriff immunized from actions at law for damages for violation of privacy rights. *Cf.* 18 U.S.C. §922(s)(7) (CLEO not liable in an action at law for damages for failure to prevent a transfer to an unlawful recipient or for prevention of a transfer to a lawful recipient).

If the sheriffs voluntarily check records as a service to their constituents, they are then faced with the necessity, should an ineligible person be discovered, of informing the dealer and of preparing a legal opinion letter. Any sheriff who vetoes a purchase and then refuses to explain why would be attacked politically. Such a sheriff would also be exposed to being sued under §925A, which provides that any person denied a firearm due to erroneous information

provided by any State or political subdivision thereof "may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer." Relief includes an order directing the correction of the erroneous information or "that the transfer be approved" by the CLEO, together with attorney's fees.

Parts of the record bear out the fact that the sheriffs will be held politically accountable for not administering the Brady commands because of the adverse consequences to their constituents from the related Brady Act provisions. Sheriff McGee is the elected sheriff of Forrest County, Mississippi. The entitlement to purchase a handgun is valued by many voters. *See* Miss. Const., Art. III, §12 ("The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question"); Miss. Code §45-9-51 ("no county or municipality may adopt any ordinance that restricts or requires the possession, transportation, sale, transfer or ownership of firearms").[1]

There are 75 licensed firearm dealers in Forrest County. (Ex. D, McGee Dec., No. 5, RE, tab 7.) One of them, Big Buck Sports, made 755 handgun transactions the past year, which would average 63 transactions requiring Brady checks per month. (Ex. E, Price Dec., RE tab 9.)

---

[1] *See Romero v. United States*, 883 F.Supp. 1076, 1080 (W.D.La. 1995) (Brady Act causes political harm by putting sheriff in middle of conflict between voters who believe Act violates right to bear arms and those who support Act).

Pawn Shop Plus noted an average of 85 handgun transactions per month. (Ex. C, Fisher Dec., RE tab 8.)

At the hearing, Sheriff McGee testified that he had been doing 6 to 8 checks per day. (RE tab 14, at 11.) The NCIC might render as many as 60 to 70 individuals with a common name. (15) Sheriff McGee receives a computer printout listing every person with a certain name or alias and a certain (or similar) date of birth in the United States. (45) A third of the searches result in a detailed response. In some, it must be determined whether a conviction is a misdemeanor or felony. (46) On occasion, the Sheriff has required individuals to come into the office to determine if they were persons identified in the NCIC check. (41)

One search might take between 15 and 30 minutes. (41-42) Searches consume an hour and a half of time per day. (42, 47) No authority exits to charge for the searches. (48-48)

Once he determines that the transfer is lawful, Sheriff McGee destroys the records immediately. (37) He anticipated "repercussions" and "recourse" against him if he did not destroy the records. (27) He believes that he is required to keep the forms for denied persons because he must, within 20 days of a request, explain a denial. (37) A denied person does not have a time limit on when he can make his request. (40) No denials had been made so far. (40-41)

Sheriff Koog (now succeeded by Sheriff Gonzalez) is the elected sheriff of Val Verde County, Texas. The right

to obtain a handgun is a political value of many voters. *See* Tex. Const., Art. 1, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State"); Tex. Local Gov't. Code §215.001(a) ("A municipality may not adopt regulations relating to the transfer, private ownership, keeping, transportation, licensing, or registration of firearms").

Sheriff Koog testified at the hearing on April 15, 1994, that "If I were to make a reasonable check under my terms it'd take a week or more, for each check. And it would severely impact my patrol duties . . . ." (RE, tab 11, at 25.) Checks conducted so far by Sheriff Koog were limited to TCIC and NCIC because "I had a deluge of burglaries on the river, and family violence, and you name it. I just don't have the manpower." (28) No funds are available in the budget for the checks. (28)

Koog expected 50 to 100 checks per month to be required. (37) There are 42 registered firearms dealers in Val Verde County. (37) He felt that he must conduct a background check on every person, even personal acquaintances. "My duties as sheriff are to be fair and apply the law equally." (37-38) He elaborated:

> Q. Sheriff Koog, would it smack . . . you as political favoritism if someone came in and wanted to purchase a handgun, and you didn't perform these checks . . . ?
>
> A. If I started that, I bet your boots I wouldn't be in office next year, next term.

> Q. So you're not going to engage in political favoritism on doing . . . background checks for the Brady Bill?
>
> A. They come in with a pistol purchase, they're going to get a check, if I have to do it. (42)

Besides the political damage, Sheriff Koog anticipated potential civil suits by the State Rifle Association or by individuals being checked. (29) Suits could be filed if he enforced the Act and if he did not enforce the Act. (29)

The above illustrates the point of *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 2424 (1992) about the blurring of responsibility:

> Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . . .

In the case at bar, the federal mandate leaves the sheriffs holding the bag. Because of the political damage and the exposure to lawsuits caused by the failure to administer the unconstitutional commands, the sheriffs clearly have standing to challenge the waiting period and notification requirements.

The United States suggests that this Court may reach the issue of severability in *Printz* and *Mack*, and thus need not consolidate these cases. It also suggests that petitioners in *Printz* and *Mack* will present the question of severability in their briefs on the merits. (Br. 3.) Nonetheless, consolidation of these cases with *Printz* and *Mack* would be helpful from the viewpoint of illustrating to this Court the facts in these additional cases which provide further proof of the burdensome character of the unconstitutional mandates at issue.

Accordingly, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Furthermore, this case should be consolidated with *Printz v. United States, cert. granted*, No. 95-1478 (June 17, 1996) and *Mack v. United States, cert. granted*, No. 95-1503 (June 17, 1996).

STEPHEN P. HALBROOK*
Richard E. Gardiner
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorneys for Petitioner
*Counsel of Record